No. 12,157

IN THE

United States Court of Appeals

For the Ninth Circuit

ALEXANDER LAWRENCE ALPERS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S REPLY BRIEF.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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APPELLANT'S REPLY BRIEF.

I.

THE BURDEN IS UPON APPELLEE TO PROVE THAT THE SHIPMENT IN INTERSTATE COMMERCE OF OBSCENE PHONOGRAPH RECORDS COMES WITHIN THE MEANING AND INTENDMENT OF TITLE 18 U.S.C.A. SECTION 396.

The burden rests upon appellee to show that the acts of appellant constitute a crime against the United States. It is not enough that appellee show that the accused was guilty of reprehensible conduct. It is not enough that appellee show that such acts *ought* to be a crime. Appellee must show that the acts complained of *actually are* a crime.

We, too, have no sympathy for the "purveyors of obscenity and merchants of filth" nor for the "ignoble

end'' which they serve. However, we do have the utmost respect for the law and for the principles on which it was founded and by which it has grown and developed. We believe that it is far more important to society for this court to uphold those principles of law, even at the cost of permitting conduct it deems reprehensible to go unpunished, than it is to punish such conduct and in so doing to twist and distort these principles beyond recognition. Therefore, we have insisted that appellee prove that the acts of appellant constitute a crime under the law and under the principles upon which the law is based. This appellee has failed to do. The brief submitted by appellee is a stirring statement in support of amendment of the statute, but it does not establish that the shipment of obscene phonograph records in interstate commerce is within the intendment of the statute at the present time.

II.

PHONOGRAPH RECORDS ARE NOT ''PRINTS'' WITHIN THE MEANING AND INTENDMENT OF TITLE 18, U.S.C.A. SECTION 396.

A. The word ''print'' as used in Title 18, U.S.C.A. Section 396 must be read in its plain, ordinary and usual sense and with the meaning commonly attributable to it.

Words in common use are to be construed in their natural, plain and ordinary signification and the meaning commonly attributable to them is to be preferred to any secondary hidden signification.

U. S. v. Temple, 105 U. S. 97:

> "The Supreme Court must read a statute according to the natural and obvious import of the language without resorting to subtle and forced constructions for the purpose of either limiting or extending its operation."

The word "print" is a common word with common connotations. Used in the form "a print", its common connotation is a special type of picture such as a woodcut, engraving or lithograph. Specific and well known examples of this common connotation are the Currier and Ives prints. Another common connotation of the word "print" may be found in such things as magazines, periodicals or other reading matter. A specific and common example of this connotation is newsprint. The third type of common connotation associated with the word "print" is less specific and has reference to the form in which material is presented. One thinks of something "printed" as opposed to something written by hand—a picture mechanically reproduced as against a picture drawn or painted. These are the common, plain, every day meanings of the word "print". These are the meanings of the word "print" to the average man. To locate, define and establish these meanings one does not need to search a dictionary.

B. The meaning assigned to the word "print" by appellee is hidden and obscure, is based upon a false premise and violates the accepted rules of statutory construction.

It is only by ingenious reaching that appellee has been able to arrive at the curious and hidden meaning

it desires us to accept. It is only by ignoring the common connotations of the word "print" and by the diligent and subtle searching of a dictionary that appellee is able to find some semblance of support for its interpretation. Such searching and reaching have been consistently condemned by our courts.

Lundstrom v. Commissioner, (CCA-9th) 149 Fed. (2d) 244:

> "Where the statute plainly expresses the will of Congress in language that does not permit or require strained construction, words thereof may not be extended by intendment or distorted beyond their plain and proper meaning."

Sanborn v. Commissioner, 88 Fed. (2d) 134:

> "The plain, obvious and natural meaning is always preferred to any curious hidden sense that nothing but the exigencies of a hard case and the ingenuity and study of an acute and powerful intellect would discover."

To justify the necessity for such ingenious searching, appellee states as a fundamental premise (Appellee's Brief, p. 5) that it is necessary in order to determine the precise meaning of the word used, to exclude such words as would make any of the words synonymous with one another. This premise we are asked to accept *a priori.* A simple reading of the statute and the synonymic words "book", "pamphlet" and "writing" demonstrates the impossibility of accepting this premise. Yet it is by means of this premise that appellee justifies its strained construction of the word "print".

C. The history of Title 18 U.S.C.A. Section 396 shows that the construction placed upon the word "print" by appellee is not applicable.

As appellant has pointed out (Appellant's Opening Brief, pp. 9, 10 and 11), this particular statute was amended by Congress in 1920 and there were added to its the words "motion picture film". At the time of this amendment the word "print" was an integral part of the statute. As we have seen, by this amendment Congress indicated that it did not feel that motion picture films were covered by the statute prior to that time. Appellee concedes this fact. (Appellee's Brief, p. 5.) In conceding this fact, appellee states that:

> "Congress presumably considering it more than a 'picture'."

Appellee might just as readily, and possibly more accurately, have stated that a motion picture film was more than a "print". We all know that a simple photograph such as a snapshot is referred to as a "print" when it is developed; we also know that when we take a roll of film to be developed we must advise the person developing the film of the number of "prints" we desire. A motion picture film is nothing more than a series of photographs which have been printed on a continuous roll. The only distinction in this respect between a motion picture film and a common photograph is that the motion picture film images are considerably smaller and that they are printed on a positive transparency instead of paper. In contrast to this, a phonograph record is not commonly referred

to as being "printed". A phonograph record is more commonly referred to as being molded. The reason for this is to be found in the process whereby a record is made. In this process the material from which a record is manufactured is placed into a form containing the matrix of a record in a liquid or semi-liquid condition. The material is then placed under pressure and is molded to form the finished product.

Since it was necessary for Congress to amend the statute in 1920 to include motion picture film which possesses the qualities of both "picture" and "print", it is impossible to see how the single word "print" can be strained to include phonograph records which possess none of these qualities. Rather, it would appear that in order to include these records within the statute a similar amendment must be made.

III.

PHONOGRAPH RECORDS ARE NOT WITHIN THE MEANING OF THE WORDS "OR OTHER MATTER OF INDECENT CHARACTER" AS SUCH WORDS ARE USED IN TITLE 18 U.S.C.A. SECTION 396.

If phonograph records are to be construed as being within the meaning of the term "or other matter of indecent character" as such words are used in Title 18 U.S.C.A. Section 396, they must, under the law of *ejusdem generis,* be of the same class as the articles specifically enumerated in the statute. It would seem readily apparent that appellee by arguing at length

the classification "print" and by not attempting in any way to argue any of the other classifications has already put its best foot forward, and that it believes that if phonograph records come within any of the enumerated classes, they must come within the word "print".

We have demonstrated that the word "print" cannot be construed to include phonograph records. What other classes are specifically enumerated in the statute? Those remaining are "book", "pamphlet", "picture", "motion picture film", "paper", "letter", "writing". A phonograph record is not a book nor is it a pamphlet; a phonograph record is not a picture nor a motion picture film; nor is a phonograph record a letter or a writing. It necessarily follows that phonograph records not being of the same class as the articles specified cannot be construed to be within the meaning of the statute.

The only basis upon which appellee can support its statement that phonograph records are within the general words "or other matter of indecent character" is if these words can be construed to include all matter of an indecent character. This is clearly indicated by the closing language of appellee's brief. However, we know that the statute is not all inclusive and was not intended to be all inclusive. We know, also, that under the doctrine of *ejusdem generis* these general words cannot be construed to make the statute all inclusive. Therefore, it appears that there is no support for appellee's contention that the general words can be construed to include phonograph records.

IV.

THE MORE COMPREHENSIVE CLASSIFICATIONS ESTABLISHED BY APPELLANT HAVE NOT BEEN CONTROVERTED BY APPELLEE.

While we do not believe it is essential, in the light of what has heretofore been set forth in this brief, to reaffirm the broad classifications made by appellant, we would like to point out to the court that the so-called two exceptions seized upon by appellee to disprove appellant's theory are not, in truth, exceptions at all. The Braille system was devised as a substitute for the visual sense of the blind. A book written in Braille, therefore, may be considered a type of substituted visual representation within the meaning and intendment of the statute. This is particularly so because this substitute for the visual sense is in the exact form of an article specifically prohibited by the statute.

Motion picture film at the time the amendment to the statute was made in 1920 was solely a visual representation. Today, in many instances, the sound track does accompany the visual representation but it should be noted that it is only ancillary thereto and not a substitute therefor. The visual representation still remains the prime characteristic of motion picture film. It is more complex today than it was in 1920, but this fundamental characteristic of visual representation has not been removed.

CONCLUSION.

In conclusion, it is respectfully submitted that appellee has failed to establish that obscene phonograph records are within the meaning and the purview of Title 18 U.S.C.A. Section 396. It is further submitted that under the rules of law applicable to statutory construction, the language of this particular statute does not permit the inclusion therein of phonograph records. If the shipment in interstate commerce of such records is to be prohibited, it should be done by amendment to the statute and not by the strained construction of a court.

Dated, San Francisco, California,
April 25, 1949.

Respectfully submitted,
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